No. 76-1601

In the Supreme Court of the United States

OCTOBER TERM, 1977

FOODSERVICE AND LODGING INSTITUTE, INC., ET AL.,
PETITIONERS

v.

UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.,
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Petitioners seek review of the dismissal of their challenge to the Secretary's interpretation of an exemption to the Fair Labor Standards Act.

1. This dispute arose as result of an amendment to Section 13(b)(8) of the Fair Labor Standards Act adopted in 1974, 88 Stat. 64, 29 U.S.C. (Supp. V) 213(b)(8), that requires an individual employed "primarily in connection with the preparation or offering of food or beverage for human consumption" to be paid overtime compensation after working more than a 40-hour week, unless that individual is employed in a "restaurant." Persons employed in restaurants need not be paid overtime unless they work more than 46 hours in a week.[1] For purposes of the Fair

Labor Standards Act, the Secretary's definition of "restaurant" "means an establishment which is primarily engaged in selling at retail prepared food and beverages for immediate consumption on the premises" (26 Fed. Reg. 8365-8366).

The 1974 amendments reflected no congressional intent to broaden the longstanding administrative interpretation of the word "restaurant."[2] Nevertheless, on March 4, 1975, petitioners sent a letter to the Department of Labor asking that, in light of the amendments to the Act, the requirement that a "restaurant" serve food for consumption "on the premises" be deleted so as to bring carryout restaurants within the definition. By letter dated May 1, 1975, the Acting Administrator of the Wage and Hour Division of the Department of Labor responded that (Pet. App. A-11 to A-12):

> Whether or not a quick service food establishment is a restaurant for purposes of section 13(b)(8) depends on the facts in a particular situation. * * * [W]e are of the view that so-called quick service food establishments that do not provide the characteristic employee services and the physical equipment and furnishings that patrons require for consumption of meals on the premises are not "restaurants" for purposes

[1]Prior to 1974, Section 13(b)(8) provided that the maximum hours limitation of the Fair Labor Standards Act, which requires overtime to be paid if an employee works more than 40 hours per week, did not apply to employees of restaurants. Section 13(b)(18), 29 U.S.C. 213(b)(18), provided that the maximum hours limitations of the Act did not apply to "any employee of a retail or service establishment who is employed primarily in connection with the preparation or offering of food or beverages for human consumption * * *." In 1974, Congress repealed the Section 13(b)(18) exemption, effective May 1, 1974. The Section 13(b)(8) exemption for employees of restaurants was modified.

[2]This definition has remained virtually unchanged since 1961. It was refined in 1970, 35 Fed. Reg. 5856-5905, but the above-quoted language remained unchanged. See 29 C.F.R. 779-786.

> of section 13(b)(8). On the other hand, where a particular quick service food establishment does provide the customary employee and dining room services, we would not deny the exemption. * * *

Petitioner brought suit challenging the interpretation of the word "restaurant" embodied in the letter of May 1, 1975. The district court denied the Secretary's subsequent motion to dismiss, but granted his motion for summary judgment (Pet. App. A-6 to A-7). The court of appeals vacated the district court's judgment and remanded the case with instructions to dismiss for lack of jurisdiction, holding that the controversy was not ripe for resolution (Pet. App. A-1).

2. The court of appeals was correct in precluding premature litigation based upon general statements in an opinion letter of the Secretary. Judicial review "is likely to stand on a much surer footing in the context of a specific application * * *." *Toilet Goods Association, Inc.* v. *Gardner*, 387 U.S. 158, 164. As the court of appeals stated (Pet. App. A-4):

> Appellant Institute's request was in the most general terms, and gave no tangible descriptions of the nature of the food service operations sought to be exempted. It presented rather a circumstance of the kind where, as we said in *National Automatic Laundry [and Cleaning Council* v. *Schultz*, 443 F. 2d 689 (C.A.D.C.)], ". . . judicial review at too early a stage removes the process of agency refinement, including give-and-take with regulated interests, that is an important part of the life of the agency process." 443 F. 2d at 703. We read the opinion letter under attack as far from foreclosing the possibility of rulings favorable to appellants with respect to particularized requests. The letter on its face disclaimed inflexibility with respect to the language of the pre-1974

> interpretive [*sic*] bulletin, and plainly intimated that establishments where at least a substantial amount of the food was to be consumed off the premises could still qualify as a restaurant. It was implicit with invitation to seek further administrative guidance on the basis of specific facts * * *.

Petitioners contend that they "run the risk of substantial back wage liability and potential liquidated damages, and injunctions if they erroneously fail to pay overtime premiums required by the Fair Labor Standards Act * * *" (Pet. 6). Petitioners, however, are free to request rulings from the Wage-Hour Administrator as to whether, in his opinion, *specific eating establishments* or categories of establishments, whose operations are described in detail, are "restaurants" within the meaning of Section 13(b)(8). As the court of appeals noted, the opinion letter does not foreclose "the possibility of rulings favorable to appellants with respect to particularized requests" (Pet. App. A-4). Since the opinion letter under attack here does *not* therefore require "an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance * * *," the court of appeals correctly concluded that the controversy is not ripe for adjudication. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 153.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JULY 1977.